Supreme Court, U.S.
FILED
OCT 26 2001
CLERK

No. 01-373

In the Supreme Court of the United States

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, PETITIONER

v.

LISA L. FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

6 pp

In the Supreme Court of the United States

No. 01-373

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, PETITIONER

v.

LISA L. FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The United States Court of Appeals for the Second Circuit held in this case that conduct outside the applicable 45-day limitations period (*i.e.*, before September 9, 1997) could be a basis for liability under Title VII, 42 U.S.C. 2000e *et seq.*, "because the continuing violation theory is applicable." Pet. App. 37a; see *id.* at 39a-40a. As the petition for a writ of certiorari explained (at 8-10), the Second Circuit's holding squarely implicates the question that is before this Court in *National Railroad Passenger Corporation* v. *Morgan*, No. 00-1614 (granted June 25, 2001).

In *Morgan*, the petitioner-employer has argued "that a Title VII cause of action accrues and the limitations period begins to run when a discrete allegedly discriminatory act occurs," and that "[i]n hostile environment cases in which there is no discrete allegedly discrimi-

natory act, * * * the limitations period runs, at the latest, from the time when the employee knew or should have known of acts sufficient to constitute a violation of Title VII." Pet. Br. 11, 14, No. 00-1614. The dissenting judge in this case made similar arguments. See Pet. App. 46a-54a (Korman, J., dissenting in part). As Judge Korman explained in dissent, respondent did not contact the Postal Service's Equal Employment Opportunity (EEO) office until "well past the time during which a reasonable person would have sought EEO counseling." *Id.* at 54a. If the employer's arguments prevail in *Morgan*, therefore, this Court should grant the petition in this case, vacate the decision of the court of appeals, and remand. Likewise, if the Court adopts the somewhat different analysis suggested by the United States as amicus curiae in *Morgan* (see U.S. Br. at 19-20 & n.7, No. 00-1614), the petition in this case should be granted, the judgment below should be vacated, and the case should be remanded for a determination of when respondent's cause of action accrued for acts that occurred before September 9, 1997. As the petition explained, the proper disposition of this case depends on how *Morgan* is decided.

1. Respondent claims (Br. 4-7) that a notice rule of the sort urged by the employer in *Morgan* would not undermine the Second Circuit's decision in this case. Respondent's argument appears to be that, because she contacted an EEO counselor within 45 days of her alleged constructive discharge on September 25, 1997, all incidents related to that event are actionable without regard to when they occurred. The court of appeals, however, noted (Pet. App. 32a-33a) that respondent had complained about alleged harassment well before September 1997. Despite evidence that respondent had actual notice of her Title VII claim long before she con-

tacted an EEO counselor, the court of appeals allowed respondent to go forward with claims based on all alleged incidents after April 1995. The decision of the court of appeals in this case therefore could not survive under the notice standard that has been proposed by the employer in *Morgan*. Likewise, respondent's efforts to collect damages for alleged acts that occurred before September 9, 1997, even if her hostile work environment claim accrued before that date, is inconsistent with the standard proposed by the United States in its amicus brief in *Morgan*.

2. Respondent further argues (Br. 8) that hostile work environment claims, which feature prominently in this lawsuit, "are a small part of the case" in *Morgan*. That argument lacks merit. The employee in *Morgan* brought a hostile work environment claim, which the Ninth Circuit allowed to go forward under a continuing violation theory. See *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2000) ("[W]e find sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim."), cert. granted, 121 S. Ct. 2547 (2001). Before this Court, the employer in *Morgan* has extensively discussed application of the continuing violation doctrine to hostile-environment claims. See Pet. Br. 38-46, No. 00-1614. The United States also has addressed that issue in *Morgan*. U.S. Br. at 19-20 & n.7, 27, No. 00-1614. Application of the continuing violation doctrine to hostile-environment claims is within the question presented in *Morgan*, and the Court's holding on that issue is likely to control this case.

3. Respondent notes (Br. 9) that *Morgan* does not implicate the district court's reasons for refusing to apply the continuing violation doctrine in this case,

which the Second Circuit rejected. See Pet. App. 81a (holding that continuing violation doctrine is inapplicable because respondent "fail[ed] to allege a formal and ongoing retaliatory policy or mechanism"); *id.* at 28a-30a (rejecting district court holding). The decision at issue in the government's petition is the *court of appeals'* application of the continuing violation doctrine to revive claims that otherwise would be time-barred, *not* the *district court's* refusal to hear those claims. Respondent's focus on the district court's decision is misplaced.

4. Finally, respondent observes (Br. 11) that her claims about alleged incidents that took place within the 45-day limitations period do not depend on the continuing violation doctrine. As the United States explained in the petition (at 10-11), however, respondent seeks to commence discovery and possibly go to trial on claims, arising from alleged events before September 9, 1997, that do depend on the continuing violation doctrine. Rather than allowing litigation of those potentially time-barred claims to proceed under the shadow of *Morgan*, this Court should hold the petition and consider this case with the benefit of the decision in *Morgan*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *National Railroad Passenger Corporation* v. *Morgan*, No. 00-1614, and should be disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2001